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IN THE
Supreme Court of the United States

GREEN TREE FINANCIAL CORP.—ALABAMA,
AND GREEN TREE FINANCIAL CORPORATION,
Petitioners,

v.

LARKETTA RANDOLPH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, AND CONSUMER BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, AND CONSUMER BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

This *amici curiae* brief is submitted in support of the Petitioners, Green Tree Financial Corp.—Alabama and Green Tree Financial Corporation. By letters filed with the Clerk of the Court, Petitioners and Respondent have consented to the filing of this brief.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that the brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae*, their members, or their counsel.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States. It has members located in each of the fifty states and the District of Columbia and includes banks of all types and sizes -- money center banks, regional banks and community banks. ABA members hold approximately 90 percent of the domestic assets of the United States banks. The ABA frequently appears in litigation as an *amicus curiae* where the issues raised are of widespread importance and concern to banks or consumers of banking services. Some ABA members include arbitration agreements in their consumer loan documents and deposit contracts.

The American Financial Services Association ("AFSA") was organized in 1916 and represents more than 300 companies operating more than 10,000 offices engaged in the extension of consumer credit throughout the United States. These companies range from independently owned consumer finance offices to the nation's largest financial services, retail and automobile companies. AFSA's membership includes national and state banks that operate multi-state consumer credit programs. Some AFSA members include arbitration agreements in their consumer loan documents.

The Consumer Bankers Association ("CBA") was founded in 1919 to provide a progressive voice for the retail banking industry. CBA members hold more than 900 bank and thrift charters with total assets of more than $2.9 trillion, and are leaders in the areas of consumer, auto, home equity and education finance, bank sales of investment products, small business services and community development. Some CBA members include arbitration agreements in their consumer loan documents and deposit contracts.

QUESTIONS PRESENTED

This brief addresses question two in the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

Members of the *amici* organizations rely upon arbitration to resolve disputes with their customers in a fair, inexpensive, and efficient manner. These banks and other financial institutions therefore rely on the enforceability of arbitration agreements in this Nation's courts, in keeping with the strong federal policy in favor of arbitration embodied in the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16.

This Court has repeatedly held that the FAA establishes a federal policy in favor of arbitration, and that therefore a party seeking to invalidate an arbitration agreement has the burden of establishing that the agreement should not be enforced. The Eleventh Circuit, however, has ruled that an arbitration agreement is unenforceable unless there is a specific demonstration of the affordability of arbitration. This decision undermines the policy in favor of arbitration, and creates an inappropriate burden upon a party seeking to enforce an arbitration agreement.

Placing the burden on the party opposing arbitration is logical and workable. It recognizes that an arbitration agreement is a contract or a part of a contract, and that a party seeking to invalidate a contract bears the burden of establishing that a contract is invalid. This rule conserves judicial and litigant resources: it is much more efficient to require that the objecting party identify the flaws in the agreement, rather than requiring that another party prove the agreement is flawless.

Here, the proper application of the burden would have delayed or avoided the need for judicial involvement. Instead of entertaining conjecture, the Eleventh Circuit

should have required that the plaintiff find out the exact fees it would be charged to proceed with arbitration, demonstrate why the fee-shifting provisions of the Truth-in-Lending Act ("TILA"), 15 U.S.C. §§ 1601 *et seq.*, and Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §§ 1691-1691f, did not provide adequate protection, and establish that the costs associated with arbitration rendered the agreement to arbitrate unenforceable.

The presumption in favor of arbitration is based on sound principle and is fair to consumers. Congress and empirical studies have found that arbitration is an inexpensive, efficient, and fair means of resolving disputes. Economic theory also supports the presumption in favor of arbitration because enforcing arbitration agreements allows contracting parties and society to capture the benefits and efficiencies that those agreements allow.

Finally, the Court of Appeals erred because, under the FAA and contract law, any doubts regarding the validity of terms of an arbitration agreement should have been resolved by interpreting the agreement to uphold its validity.

For all of these reasons, the Court of Appeals' judgment should be reversed.

ARGUMENT

I. THE ELEVENTH CIRCUIT'S INVALIDATION OF THE PARTIES' ARBITRATION AGREEMENT WAS INCONSISTENT WITH THE FEDERAL ARBITRATION ACT.

Congress adopted the FAA to ensure that written agreements to arbitrate are "valid, irrevocable, and enforceable" in contracts involving interstate commerce. 9 U.S.C. § 2. The FAA reflects "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). "[T]he basic purpose of the [FAA] is to overcome courts'

refusals to enforce agreements to arbitrate." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995) (citation omitted); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

In keeping with the FAA, this Court has emphatically rejected "the old judicial hostility to arbitration." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480-81 (1989) (internal quotations and citations omitted). "[G]eneralized attacks on arbitration," *Gilmer*, 500 U.S. at 30, and the "suspicion of arbitration as a method of weakening the protections afforded in the substantive law . . . [have] fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes," *Rodriquez de Quijas*, 490 U.S. at 481 (citation omitted). Instead, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24-25 (citations omitted).

The FAA places the burden on the party seeking to invalidate an arbitration agreement. "The Arbitration Act, standing alone . . . mandates enforcement of agreements to arbitrate statutory claims." *Shearson/American Express v. McMahon*, 482 U.S. 220, 226 (1987). A party seeking to avoid that mandate must prove that there are adequate grounds for doing so. For example, "[t]he burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 227 (citation omitted). Similarly, the burden is on parties seeking to invalidate their arbitration clauses on the grounds that arbitrators are biased. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985) ("We decline to indulge the presumption" that a forum will not find competent and unbiased arbitrators); *see also Gilmer*, 500 U.S. at 30 (same).

The same burden applies to parties that claim that arbitrators might fail to follow the law. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995); *McMahon*, 482 U.S. at 232. Following this reasoning, Courts of Appeals have placed the burden on parties who allege that the fees and costs for arbitration are so high that they prevent plaintiffs from vindicating their statutory rights through arbitration. *See Dobbins v. Hawk's Enters.*, 198 F.3d 715, 717 (8th Cir. 1999); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 16 (1st Cir. 1999).

The plaintiff below sought to invalidate her arbitration agreement mainly on the ground that the costs of arbitration would prevent her from vindicating her statutory rights under the TILA. *See* Br. for Appellant at 34. However, the plaintiff did not establish that she was facing excessive fees or costs that prevented her from arbitrating her dispute. Indeed, plaintiff could only speculate about whether the fees and costs would prevent her from vindicating her statutory rights because she did not even attempt to agree on an arbitrator with the defendants, as she was required to do by her contract. *See* Pet. App. at 57a.[2] In light of plaintiff's failure, the Eleventh Circuit's decision to invalidate the arbitration agreement was inconsistent with the FAA and this Court's decisions.

In place of proof from the plaintiff, the Eleventh Circuit offered its own "serious concerns with respect to filing fees, arbitrators' costs and other arbitration expenses." Pet. App. at 17a-18a. The arbitration agreement itself raised no such concerns -- the relevant provision simply left the issue to be resolved by the parties at a later date in accordance with the law underlying plaintiff's statutory claims, when the parties jointly agreed on an arbitrator. *See* Pet. App. at 57a. But the

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[2] "Pet. App." refers to the appendix to the petition for a writ of certiorari in this case.

Eleventh Circuit noted that fees and costs "*may* curtail or bar a plaintiff's access to the arbitral forum," *see* Pet. App. at 17a (citing *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054 (11th Cir. 1998)) (emphasis added), and then declared that the arbitration agreement would therefore defeat the remedial purpose of the TILA, *see* Pet. App. at 18a. This imposition of judicial distrust of the parties' contracted-for arbitration structure constituted an improper shifting of the burden to the party seeking to enforce the arbitration agreement.

The Eleventh Circuit's reasoning was not made more appropriate by the fact that the parties here entered into their arbitration agreement before their dispute arose. Such pre-dispute agreements are commonplace. As a general matter, arbitration favors all parties who seek a speedy and inexpensive method to resolve their disputes. It is on that basis that parties jointly agree to enter into a general pre-dispute arbitration agreement. After a particular dispute arises, however, one side or the other may decide it would be advantageous (e.g., for settlement leverage or other tactical reasons) to employ judicial procedures, instead of arbitration, for resolving that particular dispute. But the arbitration agreement was made a *contract*, intentionally binding the parties, and is not just an expression of expectations. And a party's inability to foresee whether circumstances would later make judicial procedures more desirable for a particular dispute than arbitration are not in principle any different from (and in the vast majority of cases less consequential than) a party's inability to foresee that she might benefit, say, from a floating interest rate rather than a fixed one. Indeed, the FAA is explicit that a pre-dispute arbitration agreement is equally binding as a post-dispute agreement. *See* 9 U.S.C. § 2 ("A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy *thereafter arising* out of such contract or transaction . . . shall be valid, irrevocable, and enforceable . . . ." (emphasis added)).

If the parties in this case had entered into the identical arbitration agreement *post-dispute*, it clearly would be fully enforceable. Plaintiff's arguments about the potential costs of arbitration constituting a forfeiture of her rights under the TILA, or any of the other arguments she advanced in the courts below for avoiding arbitration, would be obviously unpersuasive grounds for disregarding an arbitration contract she had just made. Considered as a post-dispute arbitration agreement, for example, it would surely have been permissible for her to enter into an agreement to arbitrate that did not expressly address how costs would be allocated, but gave her the opportunity to veto an arbitrator whose costs were unacceptable. And, as noted above, the fact that this arbitration agreement was entered into *pre-dispute* does not justify any different analysis or conclusion under the FAA.

II. PLACING THE BURDEN ON THE PARTY SEEKING TO INVALIDATE ITS AGREEMENT TO ARBITRATE IS LOGICAL, WORKABLE, AND FAIR.

As noted above, both the FAA and this Court's precedents place the burden on the party seeking to invalidate an arbitration agreement. This placement of the burden is logical, workable and justified. It is a burden that is supported by general principles of contract and evidence, and justified as a matter of judicial procedure and common sense. In addition, empirical data and economic theory alike support placing the burden on the party opposing arbitration.

A. Placing the Burden on the Party Opposing Arbitration Is Logical and Workable.

1. *Placing the Burden on the Party Opposing Arbitration Is Consistent with Standard Contract Law.*

The FAA requires that courts enforce arbitration agreements "like other contracts." *Volt Info. Sciences, Inc. v.*

Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989); *see also Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974) (FAA places arbitration agreements "upon the same footing as other contracts" (internal quotations and citations omitted)). Thus, courts must apply ordinary state contract law to arbitration agreements. *See Perry v. Thomas*, 482 U.S. 483, 492-93 n.9 (1987). Under ordinary contract law, a party seeking enforcement of a contract must first demonstrate the existence of a contract. *See, e.g., Sims v. Blanchris, Inc.*, 648 F. Supp. 480, 484-85 (S.D.N.Y. 1986). After that has been shown, however, "[a] party asserting the invalidity of a contract has the burden of proving such invalidity." *Smith v. Odell*, 108 So. 400, 401 (Ala. Ct. App. 1926); *see also Walsh v. Schlecht*, 429 U.S. 401, 408 (1977) ("[A] general rule of construction presumes the legality and enforceability of contracts." (citation omitted)). For example, a party that wants a contract declared unconscionable has the burden of establishing unconscionability. *See Ex parte Napier*, 723 So. 2d 49, 53 (Ala. 1998). Similarly, it is appropriate to place the burden of establishing invalidity on a party seeking to avoid an arbitration agreement.

2. *Placing the Burden on the Party Opposing Arbitration Conserves Judicial and Litigant Resources.*

Sound reasons underlie the rule that the burden is on the party seeking to avoid her arbitration agreement to establish that it is invalid, rather than placing a burden on the party seeking to enforce the agreement to establish that there are no grounds for challenge. It would be extremely burdensome and wasteful -- and contrary to the Congressional purpose of establishing arbitration as an expeditious alternative to litigation -- to require that the party seeking to enforce the arbitration agreement develop and proffer evidence and legal grounds in support of the propriety of every aspect (fee structure, arbitrator selection, location of proceedings, rules

of procedure and evidence, etc.) of the agreement. *See* Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 Stan. L. Rev. 1477, 1503 (1999) ("[I]t would be inefficient to require [one party] to anticipate and produce evidence contravening the indefinite number of defenses that [the other party] might plead in a given case."); Kevin W. Saunders, *The Mythic Difficulty in Proving a Negative*, 15 Seton Hall L. Rev. 276 (1985) (explaining that courts should place burden of production on the party that can resolve the issue by presenting less evidence).

Furthermore, the party objecting to enforcement of the arbitration agreement should bear the burden because that party often will possess relevant information that is uniquely within its control. In the arbitration context, a party claiming that arbitration is improper will typically be in the best position to explain what prevents her from obtaining relief. For example, in cases where parties have asserted that arbitration is improper because they cannot afford it, courts have required the parties to document the fees and their financial condition. *See, e.g.*, *Dobbins*, 198 F.3d at 717; *Rollins, Inc. v. Foster*, 991 F. Supp. 1426, 1438-39 (M.D. Ala. 1998). When matters are peculiarly within one party's knowledge, it is routine to place a presumption against that party on the relevant issue until it offers evidence to the contrary. *See Campbell v. United States*, 365 U.S. 85, 96 (1961); *Dorsey v. Dorsey*, 66 So. 2d 135, 139 (Ala. 1953); Posner, *supra*, at 1502-03.

This allocation of burden is especially apt here. The arbitration agreement that plaintiff and Green Tree adopted did not expressly address the costs associated with the arbitration proceeding, but it did give plaintiff the opportunity to veto an arbitrator who was unacceptable to her. *See* Pet. App. at 57a. There is no reason why plaintiff, in light of her burden to establish the invalidity of the arbitration agreement, should not have been required to establish that she was unable to satisfy her concerns about

costs by rejecting any arbitrator whose costs were unacceptable.

3. *Arbitration Fees and Costs Would in Any Event Be Awarded to a Prevailing Plaintiff in this Case, in Accordance with the TILA and ECOA.*

Placing the burden on the party seeking to avoid arbitration is particularly appropriate here, where plaintiff's claims are under the TILA and ECOA. Both the TILA and ECOA explicitly provide that "in the case of any successful action . . . the costs of the action" shall be awarded to a prevailing plaintiff. 15 U.S.C. § 1640(a)(3) (TILA); *id.* § 1691e(d) (ECOA). As the Eleventh Circuit acknowledged, when there is evidence that "most successful arbitral claimants were awarded fees and costs," such fees and costs cannot serve as grounds for invalidating an arbitration agreement. Pet. App. at 19a (citing *Rosenberg*, 170 F.3d at 15-16); *see also Wells v. Chevy Chase Bank F.S.B.*, No. 24-C-99-000202 (Cir. Ct. for Baltimore City Aug. 16, 1999) (order compelling arbitration). The arbitration clause in this case requires that the arbitrator enforce the law, and the relevant law here includes fee-shifting requirements. *See* Pet. App. at 57a.[3] Therefore, even if the Eleventh Circuit's speculation about the potential for high arbitration costs and fees was appropriate -- which it was not -- the presumption in

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[3] The rules of the major arbitration forums also explicitly require that arbitrators follow the statutory law. *See* National Arbitration Forum ("NAF") Code of Procedure, Rule 20A, *available at* <http://www.arb-forum.com/library/code.html> [hereinafter NAF Code R.]; American Arbitration Association ("AAA"), Rules/Procedures, Arbitration Rules for the Resolution of Consumer-Related Disputes, Rule 13, *available at* <http://www.adr.org> [hereinafter AAA Consumer Disputes R.]; JAMS/Endispute Financial Services ("JAMS/Endispute") Arbitration Rules and Procedures, Rule 20(c) [hereinafter JAMS/Endispute Rule].

favor of arbitration still applies here because a prevailing plaintiff will recover any costs and fees through arbitration.[4]

If an excessive fee actually materialized, and was improperly imposed on plaintiff, she would have access to the courts to address that problem. Parties that face such an obstacle may challenge the agreement on this ground *after* they have attempted to bring a claim in arbitration. *See, e.g.*, *Dobbins*, 198 F.3d at 717 (requiring the party opposing arbitration to attempt to arbitrate the claim and prove that he or she cannot afford the fees in question);[5] *see also Rosenberg*, 170 F.3d at 15-16 (holding that any objection to costs of arbitration could be raised with court reviewing arbitration award); *Howard v. Anderson*, 36 F. Supp. 2d 183, 186 (S.D.N.Y. 1999) (upholding arbitration agreement because plaintiff had not demonstrated that excessive fees had been demanded); *Walker v. MDM Servs. Corp.*, 997 F. Supp. 822, 826 (W.D. Ky. 1998) (upholding arbitration agreement because plaintiff never proved she would be required to pay a fee); *Rollins*, 991 F. Supp. at 1439 (upholding arbitration agreement because plaintiff "failed to show she is effectively locked out" of arbitration). At no time should a court indulge, as the Eleventh Circuit did here, "an assumption that the proof would support a 'worst case' scenario." *Green Tree Fin. Corp. v. Wampler*, 749 So. 2d 409, 415 (Ala. 1999) (upholding an arbitration agreement in the face of challenges based on excessive fees).[6]

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[4] A prevailing plaintiff would also recover "a reasonable attorney's fee" pursuant to the TILA and the ECOA. *See* 15 U.S.C. § 1640(a)(3) (TILA); *id.* § 1691e(d) (ECOA).

[5] Indeed, the Eighth Circuit Court of Appeals in *Dobbins* suggested that if the plaintiff did prove that the arbitration costs in question were so excessive that they prevented access to arbitration, the district court should accept the defendant's offer to pay these costs. *See Dobbins*, 198 F.3d at 717 & n.4.

[6] *See, e.g.*, *Dobbins*, 198 F.3d at 717; *Rosenberg*, 170 F.3d at 16; *Howard*, 36 F. Supp. 2d at 186; *Walker*, 997 F. Supp. at 826; *Rollins*, 991

4. *Any Potential Defects in Arbitration Proceedings Are Subject to Correction through Judicial Review.*

Placing the burden on the party seeking to avoid arbitration is also appropriate because post-arbitration judicial review can remedy defects in the arbitration process when appropriate. The FAA provides for court review of an arbitration award for manifest disregard of the substantive law. *See* 9 U.S.C. § 10(a)(4). This Court has held that "such review is sufficient to ensure that arbitrators comply with the requirements of the statute." *McMahon*, 482 U.S. at 232; *see also Gilmer*, 500 U.S. at 32 n.4 (quoting *McMahon*, 482 U.S. at 232). Here, the Eleventh Circuit should have recognized that if the arbitrators failed to shift fees and costs in keeping with the TILA and ECOA, plaintiff would have had an opportunity to seek judicial review of that decision.

Similarly, if an individual arbitrator proves to be biased or improperly excludes evidence, the Federal Arbitration Act provides for judicial review. *See* 9 U.S.C. § 10(a)(2), (3) (permitting courts to vacate arbitration awards "[w]here there was evident partiality or corruption in the arbitrators" or "[w]here the arbitrators . . . refuse[ed] to hear evidence pertinent and material to the controversy"); *see also Gilmer*, 500 U.S. at 31 (reviewing the standards for determining arbitrator bias). As an initial matter, courts must "decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." *Mitsubishi*, 473 U.S. at 634. But if a party proves that an arbitrator is partial, the court may appoint a new neutral arbitrator to hear the dispute. *See* 9 U.S.C. § 5 (permitting courts to appoint a new arbitrator "if for any . . . reason there

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F. Supp. at 1438-39. *Cf. Gilmer*, 500 U.S. at 30 (declining to presume that arbitration forum will not find competent and unbiased arbitrators); *McMahon*, 482 U.S. at 232 (declining to presume that arbitrator will not follow law).

shall be a lapse in the naming of an arbitrator"); *see also Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 896 (2d Cir. 1997) (appointing a neutral arbitrator).[7]

B. Placing the Burden on the Party Opposing Arbitration Is Justified Because Arbitration Works Well for Consumers.

Congress has expressly recognized arbitration's benefits to individuals, and empirical studies support Congress's faith in arbitration. Thus, before closing the door on the efficiencies and other benefits of arbitration, it is perfectly appropriate that courts put to the test any party that opposes enforcement of an arbitration agreement.

1. *Congress Has Recognized that Arbitration Helps Consumers.*

"Congress, when enacting [the FAA], had the needs of consumers . . . in mind," *Allied-Bruce Terminix*, 513 U.S. at 280 (citation omitted), and was guided by the success of arbitration in the United States. The Senate Judiciary Committee Report prepared in connection with the FAA noted that "[t]he desire to avoid the delay and expense of litigation persists. The desire grows with time and as delays and expenses increase. The settlement of disputes by arbitration appeals to . . . business . . . as well as to individuals." S. Rep. No. 68-536, at 3 (1924). The Report went on to document the fact that arbitration took weeks where litigation took years; that the costs of arbitration were "trifling" compared to the expense of litigation; and that the participants in arbitration -- "winners and losers alike" -- were satisfied with the arbitration process. *Id.*

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[7] Such cases are rare because, as discussed below, arbitration forums have detailed rules that eliminate the potential for excessive fees or bias. *See infra* Part II.B.

Congress has consistently reiterated its strong belief in the benefits of arbitration. In 1982, a House of Representatives Report stated that "[t]he advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling . . . ." H.R. Rep. No. 97-542, at 13 (1982); *see also Allied-Bruce Terminix*, 513 U.S. at 280. As recently as last year, the federal policy favoring arbitration was reaffirmed by Congress in the Y2K Act, which "encourage[s] . . . parties . . . to resolve disputes [relating to the millennium] . . . by alternative dispute mechanisms in order to avoid costly and time-consuming litigation." Y2K Act, Pub. L. No. 106-37, § 2(b)(3), 113 Stat. 185, 187 (1999) (codified at 15 U.S.C. §§ 6601-6617). Congress justified the use of arbitration by citing the "delays, expense, uncertainties, loss of control, adverse publicity, and animosities that frequently accompany litigation," *id.* § 2(a)(3)(B)(iv), adding that "small businesses and individuals . . . already find the legal system inaccessible, because of its complexity and expense," *id.* § 2(a)(5). *Accord id.* § 2(a)(3)(B)(iii).

2. *Arbitration Is Inexpensive, Fast, and Fair.*

Congress's faith in the benefits of arbitration is well justified. First of all, arbitration is demonstrably inexpensive, and therefore "helpful to individuals . . . complaining about a product, who need a less expensive alternative to litigation." *Allied-Bruce Terminix*, 513 U.S. at 280 (citation omitted). The three major national arbitration agencies that hear consumer claims all offer small-dispute fee structures that compare favorably with the $150 filing fee for claims in federal court. *See* 28 U.S.C. § 1914(a). For example, the maximum filing fee for a consumer filing a claim valued at under $5000 before the National Arbitration Forum is $49. *See* NAF Code, Filing Fees, Fee Schedule.

Consumers filing claims of up to $15,000 pay a maximum filing fee of only $100. *See id.* The American Arbitration Association offers a similar fee structure for consumer claims. *See* AAA Consumer Disputes R., Administrative Fees ($125 arbitrator's fee for consumer disputes under $10,000). And the rules of JAMS/Endispute require that the fee structure agreed to by the parties "allocate costs in a way that does not preclude access by the consumer to the procedures." *JAMS Minimum Standards of Procedural Fairness Policy on Financial Services Arbitrations*, Standard 6, *available at* <http://www.jamsadr.com/arbitrationrules/index.htm>. Furthermore, each major national arbitration forum will waive its fees upon a showing of hardship. *See, e.g.*, NAF Code R. 45 (permitting the waiver of fees in hardship cases); JAMS/ Endispute R. 28(c); *see also Dobbins*, 198 F.3d at 717 (noting that AAA permits the waiving of fees in hardship cases and holding that the plaintiff should first seek the waiver before objecting in court to arbitration fees).

Arbitration also offers simple and informal procedures that allow an individual to pursue a claim without having to pay a lawyer to shepherd it through the complexities of our court system. *See* Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 55, 56-57 (1998); Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public Law Disputes*, 1995 U. Ill. L. Rev. 635, 646. Thus, "for smaller, simpler, more routine cases, it is hard to beat administered arbitration." Berthold H. Hoeniger, *Commercial Arbitration Handbook* § 3.10 (1st ed. 1990, rev. 1-1991). "Many consumer disputes, which often involve simple factual issues, can be resolved quickly and relatively cheaply through arbitration." Anne Brafford, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. Corp. L. 331, 333 (1996) (citation omitted).

By contrast, litigation is often prohibitively expensive and prevents many individuals from obtaining relief. The *ABA Journal* reports that most lawyers will not even take cases worth less than $20,000. *See* Jill Schachner Chanen, *Pumping Up Small Claims*, A.B.A. J., Dec. 1998, at 18. Thus, it is not surprising that only one in three Americans agrees that taking a case to court is affordable and "[n]early nine of ten point to the costs of legal representation as the main barrier" to the adjudication of claims. Frank A. Bennack, Jr., *A Report on the National Survey* (May 14, 1999), *available at* <http://www.ncsc.dni.us/PTC/results/report.htm> (referring to *National Center for State Courts' 1999 National Survey: How the Public Views the State Courts* (June 28, 1999)).[8]

Arbitration is also faster than litigation. Although there are no major studies analyzing arbitration in the consumer context, the impact of arbitration in other settings demonstrates the benefits of arbitration for resolving individuals' claims. A study that compared employment claims filed through the AAA with similar claims filed in federal court found that, on average, arbitration resolved cases in half the time of litigation. *See* Maltby, *supra*, at 55. The relative speed of arbitration is not surprising. Cases are delayed in litigation because "the workload of the federal Judiciary has increased dramatically . . . [a]nd all indications are that . . . future caseloads will be larger and the demands on judicial resources even greater in the years to come." Administrative Office of the United States Courts, News

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[8] Class actions are not an effective remedy for these high litigation costs because the strict standards for class certification mean that most actions still must be pursued on an individual basis, where arbitration can be most helpful. *See* Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, RAND Institute for Civil Justice, Executive Summary 5 (1999), *available at* <http://www.rand.org/publications/MR/MR969.1.pdf> (finding that a large number "of cases in which class action status is sought are dropped when the plaintiff attorney concludes that the case cannot be certified or settled for money").

Release, Dec. 9, 1998, *available at* <http://www.uscourts.gov /Press_Releases/ 5yr.htm> (internal quotations omitted). As one commentator has noted, "[o]ur court systems, inundated by narcotics and other criminal cases and required to dispose of them quickly under federal and state speedy trial acts, must increasingly relegate ordinary civil litigation to second-class status." Hoeniger, *supra*, § 1.02 (citations omitted).

Importantly, the cost and time efficiencies of arbitration do not sacrifice fairness. A review of the nationally recognized arbitration forums demonstrates that each has explicit requirements designed to ensure that all appointed arbitrators be unbiased. *See, e.g.*, AAA Consumer Disputes R. 4; JAMS/Endispute R. 12; NAF Code R. 20. Arbitrators are generally former judges, practicing attorneys, or law professors, and must have many years of relevant experience. *See, e.g.*, NAF, *Arbitration Bill of Rights*, Commentaries to Principles 3-4 (1999), *available at* <http://www.arb-forum.com>; *see also* AAA Consumer Due Process Protocol, Principle 4, *available at* <http:// www.adr.org/education/ education/consumer_protocol.html>. These facts confirm this Court's observation that courts must "decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." *Mitsubishi*, 473 U.S. at 634.[9]

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[9] Arbitration forums also have additional protections against arbitrator bias. First, AAA and NAF require their arbitrators to disclose any circumstances that might preclude them from being impartial. *See* AAA Consumer Disputes R. 4(b); NAF Code R. 23. Second, all three major arbitration forums allow parties to challenge arbitrators for cause. *See* AAA Consumer Disputes R. 4(b); JAMS/Endispute R. 12(c); NAF Code R. 23(C). Indeed, the NAF also permits each party to make one peremptory challenge of arbitrators. NAF Code R. 21. Finally, arbitration forum procedures regulating recusal of an arbitrator are very similar to the judicial canon of ethics and federal statutes regulating the conduct of federal judges. *Compare* NAF Code R. 21, 23 *with* 28 U.S.C. § 455 *and* Canon 3E, Code of Judicial Conduct.

In addition to these protections against arbitrator bias, modern arbitration provides other procedures to ensure that the rights and interests of consumers are protected. The arbitration rules, for example, generally provide for discovery, including document production requests, interrogatories, and depositions. *See, e.g.*, AAA Consumer Disputes R. 8; JAMS/Endispute R. 13; NAF Code R. 29. Arbitrators may subpoena documents, and in some cases witnesses, for hearings, *see* AAA Consumer Disputes R. 8(a); JAMS/Endispute R. 16; NAF Code R. 30, and prior to a hearing, the parties are required to exchange information regarding anticipated witnesses and documents that they intend to use at trial, *see* JAMS/Endispute R. 13; NAF Code R. 31.

3. *Consumers Are Generally More Successful in Arbitration Than through Traditional Litigation in Vindicating Their Statutory Rights.*

An analysis of arbitration results demonstrates that consumers are more successful in vindicating their statutory rights through arbitration than through traditional litigation. Indeed, one study that compared the results in arbitration and litigation for similar cases found that individuals are four times more likely to prevail in arbitration. *See* Maltby, *supra*, at 46-48 (comparing Lisa Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 Employee Rts. & Employment Pol'y J. 189 (1997), with data from federal district courts); *see also* Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication in Consumer Dispute Resolution*, ABA Special Comm. on Dispute Res. 332 (ABA 1983) (citing study finding that civil arbitration awards were virtually identical to verdicts rendered by judges and juries in similar cases). Similarly, NAF materials indicate that individuals win 70 percent of the claims brought against corporate entities before the NAF. *See Arbitration Bill of Rights*, *supra*, Principle 1 Commentary. And even when

individuals lose in arbitration, they typically feel that they nonetheless have had a fair hearing. One recent study of securities arbitration indicated that well over 90 percent of the participants in arbitration believed their cases were handled fairly. *See* Gary Tidwell et al., *Party Evaluation of Arbitrators: An Analysis of Data Collected from NASD Regulation Arbitrations* at 25 (Aug. 5, 1999) (presented to the National Meeting of the Academy of Legal Studies in Business).

Thus, arbitration should be seen as a catalyst -- not an obstacle -- for TILA and ECOA enforcement. Because arbitration has proven itself to be inexpensive, quick, and fair for individuals, it furthers goals of deterrence and compensation found in the TILA and ECOA by encouraging individuals to pursue claims under those statutes that they otherwise might have forfeited because of the expense of traditional litigation. By reducing the hurdle of litigation costs, arbitration "lead[s] to an increase in the number of victims who will litigate their claims, which in turn enhances [a] potential defendant's incentive to take care." *See* Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 Sup. Ct. Econ. Rev. (forthcoming July 2000).[10]

C. Placing the Burden on the Party Opposing Arbitration Is Supported by Economic Theory.

Economic theory also counsels that courts should enforce arbitration agreements. By enacting the TILA and ECOA, Congress enabled consumers to enforce their substantive rights under the statutes by litigation. The threat of litigation helps deter lenders from violating the substantive rights of borrowers. But the threat and reality of litigation

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[10] A draft version of this article was made available to *amici* by the editor of the *Supreme Court Economic Review*, Professor Larry Ribstein of the George Mason University School of Law. Precise page citations therefore were unavailable when this brief was filed.

also involve dispute resolution costs that are visited on borrowers and lenders alike, and credit costs reflect the costs of lawyers and litigation. Neither the TILA nor ECOA states or suggests that traditional litigation maximizes the difference between the benefits and costs of dispute resolution.

It is a basic principle of economic theory -- as well as a bedrock of the legal theory of contract -- that individuals and society may be made better off through contractual modifications of their legal rights. Arbitration agreements are such a contract. As demonstrated above, arbitration lowers the cost of resolving disputes, and may increase deterrence by removing cost-related barriers to initiating a dispute under the TILA or ECOA. Accordingly, parties may decide to agree to arbitration because "the difference between the deterrence benefit and the expected total litigation costs is greater than in the default court." Hylton, *supra*. Consumers will capture much of this gain in joint wealth because competition tends to align the price of a service with the cost of providing it. *See* Richard A. Posner, *Economic Analysis of Law* 8 (5th ed. 1998). This bargain benefits the larger society as well, since arbitration also saves government resources through fewer traditional court proceedings. *See* Hylton, *supra*. Agreements regarding other alternate dispute resolution mechanisms, such as mediation, have the same salutary effect on the parties and society, which is precisely why many courts have adopted mediation programs as a preferred alternative for dispute resolution.

The ability of parties to make agreements that increase their joint wealth is enhanced and safeguarded by placing the burden on parties opposing enforcement of arbitration agreements. The presumptions favoring arbitration are consistent with the famous Coase Theorem, which holds that parties will contract around inefficient allocations of property rights so long as the transaction costs of doing so are low. *See* R.H. Coase, *The Problem of Social Cost*, 3 J. L. & Econ.

1 (1960). In the arbitration context, the Coase Theorem predicts that parties will contract around a system of litigation rights if litigation is inefficient and the transaction costs of agreeing to a more efficient alternative system of dispute resolution are low. *See* Hylton, *supra*. The transaction costs of agreeing to arbitration will remain low only so long as the courts continue to place the burden on parties that seek to invalidate arbitration agreements. Otherwise, the costs of litigating over whether the arbitration agreement is valid will erode or cancel altogether the benefits of such an agreement.

The benefits of arbitration agreements in the financial services context are substantial in part because eliminating traditional litigation does not significantly reduce the deterrent value of the relevant substantive law. In particular, the absence of class actions does not weaken the deterrence effect of the federal statutes involved here because class action litigation already plays a relatively small role in policing the practices of financial institutions. *See generally* Brief for Amicus Chamber of Commerce of the United States of America, Part IV. Congress has assigned the primary role in the enforcement of consumer finance laws to the federal banking agencies and the Federal Trade Commission ("FTC"). *See, e.g.*, 15 U.S.C. § 1607(a), (c) (TILA); *id.* § 1691c(a), (c) (ECOA). Financial institutions are regularly examined for compliance with numerous consumer laws and regulations by federal agencies, including the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Office of Thrift Supervision, and the Federal Deposit Insurance Corporation ("FDIC"). *See* 12 U.S.C. § 481; *see also* Board of Governors of the Federal Reserve System, *85th Annual Report* 220-24 (1998), *available at* <http://www.federalreserve.gov/boarddocs/RptCongress/annual98/>. In addition, each of the federal agencies has established consumer complaint divisions that investigate consumer complaints. Violations of law identified in this way can lead to the initiation of an

enforcement action against the institution to compel compliance and to provide restitution to consumers where appropriate. In 1998, FDIC examination, supervision, and enforcement actions alone resulted in the reimbursement of over $1 million to 31,222 consumers for violations of the TILA by 161 FDIC-supervised banks.[11] The FTC also engages in enforcement activities that protect consumer rights in the area of consumer credit.[12] Alongside these federal agencies, state attorney generals and state agencies also engage in the enforcement of consumer rights.[13] Consumers can rely on these other forces -- together with the threat of arbitration -- to maintain deterrence against an institution's misbehavior.

Furthermore, economic forces in the financial services industry maintain deterrence against firm misbehavior. *See*

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[11] *See* Federal Deposit Insurance Corporation, *1998 Annual Report* 34 (Aug. 1999).

[12] Federal Trade Commission, Letter to Dolores S. Smith, Director of Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System (Jan. 6, 2000). The FTC engages in enforcement activities under the Truth in Lending, Consumer Leasing, Equal Credit Opportunity, Fair Debt Collection Practices, and Electronic Fund Transfers Acts. For example, in *Fleet Finance, Inc. and Home Equity U.S.A., Inc.* ("Fleet Finance"), the FTC charged Fleet Finance in its complaint with violations of the TILA and Regulation Z, and deceptive practices in violation of the FTC Act. The final decision and order require Fleet Finance and its successor companies to pay $1.3 million for consumer redress and administrative costs. *See* Federal Trade Commission, *Fleet Finance and Home Equity U.S.A. Agree to Pay $1.3 Million Settling Charges of Deceptive Disclosures and Truth in Lending Violations in Fleet Finance Loans*, News Release, July 26, 1999, *available at* <http://www.ftc.gov/opa/1999/9907/fleet.htm>.

[13] For example, the Minnesota Attorney General recently filed a complaint against U.S. Bancorp, accusing the bank of violating the Fair Credit Reporting Act, consumer fraud, deceptive trade practices, and false advertising. U.S. Bancorp agreed to settle the lawsuit with payment of a $500,000 fine to the state, refunds to dissatisfied customers, and $2.5 million to charitable organizations. *See* Rochelle Olson, *U.S. Bancorp Settles Privacy Suit*, Seattle Times, July 1, 1999, at C2.

generally David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 Harv. L. Rev. 373 (1990). For example, contracts between credit card issuers and their customers are what economists refer to as "relational" contracts, in which the ongoing, repeated economic interactions are disciplined significantly by nonlegal forces, such as the threat that the consumer will cancel her credit card. *See* Robert Cooter & Thomas Ulen, *Law and Economics* 213 (3d ed. 2000) ("The parties to long-run relations often rely upon informal devices, rather than enforceable rules, to secure cooperation."). The threat is quite real, because switching credit cards is easy. *See* Edmund Sanders, *Credit Card Choices Abound; Industry Consolidation Is Giving Customers More Options*, Fla. Times Union, May 31, 1998, at G6. Indeed, a small change in any element of a card agreement can cause thousands of customers to cancel their cards and send an issuer's stock tumbling. *See, e.g.*, Amber Veverka, *Bank Reputations Suffer from Poor Service; Curbing Complaints, Breakdowns Now a Top Priority*, Kan. City Star, Dec. 13, 1999, at B6. More generally, bank behavior is disciplined by the fierce competition for customers both among banks and between banks and other financial institutions. *See, e.g.*, *Suntrust Banks, Inc.*, 84 Fed. Res. Bull. 1115, 1120 (1998) (noting that credit card and mortgage origination markets are unconcentrated and contain numerous competitors).

Reputational constraints also deter lender misbehavior. *Cf.* Charny, *supra*, at 412-20. Information about the practices of financial institutions is made readily available by regulatory agencies and consumer watchdog organizations. The Federal Reserve, for example, publishes surveys of credit card rates and explanations of credit card terms, *see* <http://www.bog.frb.fed.us/pubs/shop/>, and magazines such as *Consumer Reports* and other private organizations provide information about banks' reputations and the lending terms they offer, *see, e.g.*, *The New Face of Banking*, Consumer Reports, June 2000, at 19; Joan Goldwasser, *Not-So-Fantastic Plastic*, Kiplinger's Pers. Fin. Mag., May 1, 1999,

at 44 (recommending credit cards based on, *inter alia*, interest rates, late fees, levels of customer complaints, and other terms); Bankrate.com, *available at* <http://www.bankrate.com>; HSH Assocs., Financial Publishers, *available at* <http://www.hsh.com>. In light of this scrutiny, no bank can afford to gain a reputation for exploiting customers. As the chief executive officer of one credit-card company faced with customer complaints recently lamented, "[i]t takes a short time to create a bad image . . . and a long time to recover." Ron Leuty, *Providian CEO Fights To Regain Respect*, S.F. Bus. Times, Mar. 24, 2000, at 1 (internal quotations and citation omitted).

Finally, market forces also benefit consumers who are entirely uninformed. The market for financial services involves mass, standardized transactions. In such a market, a firm cannot offer different terms to the informed consumer and the uninformed consumer. Therefore, the uninformed consumer benefits from terms that are included in transactions in order to attract the business of informed consumers. *See* Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. Penn. L. Rev. 630, 638, 663-65 (1979). This process helps ensure that arbitration agreements are fair -- and so provides another basis for the presumption in favor of enforcing arbitration agreements.

Thus, Congress's determination that the burden should remain on the party who objects to the enforcement of these agreements is undergirded by both data and theory demonstrating that consumers and society benefit from the enforcement of arbitration agreements. As one economist summarizes, the benefit of arbitration to the contracting parties, together with "the added benefit that accrues when courts are relieved of the burden of managing socially undesirable litigation, suggests there should be a presumption in favor of enforcement." Hylton, *supra*.

III. CONTRACT PRINCIPLES REQUIRE THAT DOUBTS SHOULD BE RESOLVED BY INTERPRETING AN ARBITRATION AGREEMENT TO UPHOLD ITS VALIDITY.

As discussed above, this Court's precedent interpreting the FAA provides two basic rules for interpreting arbitration agreements. First, courts must give "due regard . . . to the federal policy favoring arbitration." *Volt*, 489 U.S. at 475-76. Second, courts must in all other respects interpret arbitration agreements "like other contracts" by applying ordinary state contract law. *Id.* at 478. In this case, both the federal policy favoring arbitration and standard principles of contract law happily lead to the same conclusion -- that ambiguities and gaps in arbitration agreements do not preclude arbitration but rather should be interpreted to uphold the agreement's validity.

It is well-established that ambiguous contractual provisions should be construed to uphold their validity. "Under th[e] established rules of contract construction, where there is a choice between a valid construction and an invalid construction[,] the court has a duty to accept the construction that will uphold, rather than destroy, the contract and that will give effect and meaning to all of its terms." *Homes of Legend, Inc. v. McCollough*, No. 1980921, --- So. 2d ---, 2000 WL 92255, at *4 (Ala. Jan. 28, 2000) (citations omitted). *Accord Walsh v. Schlecht*, 429 U.S. 401, 408 (1977); Restatement (Second) of Contracts § 203(a) (1979) ("[A]n interpretation which gives a reasonable, lawful, and effective meaning to all of the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.").

The foregoing principle of contract construction operates in concert with a second principle -- that parties entering into a contract are presumed to accept all the rights and obligations imposed on their relationship by state or federal law. "[E]very contract is made with reference to existing

law[,] and every law affecting the contract is read into and becomes a part of the contract when made." *United Cos. Lending Corp. v. Autrey*, 723 So. 2d 617, 621-22 (Ala. 1998) (quoting *Barber Pure Milk Co. v. Alabama State Milk Control Bd.*, 156 So. 2d 351, 355 (Ala. 1963), quoting in turn *Bush v. Greer*, 177 So. 341, 341 (Ala. 1937)) (internal quotations omitted). *Accord General Motors Corp. v. Romein*, 503 U.S. 181, 188-89 (1992). Courts therefore interpret contracts containing gaps and ambiguities to encompass any relevant and necessary statutory or common law. *See, e.g., Board of School Comm'rs of Mobile County v. Hahn*, 22 So. 2d 91, 94 (Ala. 1945) (interpreting teacher's contract to include statutory tenure provision). Any gaps in the arbitration agreement here may be filled with terms from the FAA, TILA or ECOA.

These principles make sense. Courts, after all, cannot "presume that parties to a contract intended to violate the law." *Wolffe v. Perryman*, 9 So. 148, 148 (Ala. 1891). Furthermore, contracting parties should not be forced "to specify every right and duty that they want[] to make legally enforceable." *Selcke v. New England Ins. Co.*, 995 F.2d 688, 690 (7th Cir. 1993). Indeed, it is often the case that the transaction costs of making terms of a contract explicit are higher than the cost of the uncertainty from leaving the terms vague. *See* Steven Shavell, *Damage Measures for Breach of Contract*, 11 Bell J. Econ. 466, 468 (1980) ("[B]ecause of the costs involved in enumerating and bargaining over contractual obligations under the full range of relevant contingencies, it is normally impractical to make contracts which approach completeness."). Parties to an arbitration agreement, for example, may not spell out every last detail because such terms would make the agreement very long, and having more general arbitration clauses will make enforcement easier as the substantive law may change.

Thus, ordinary principles of contract law and the FAA's policy favoring arbitration require that any doubts about the

terms of an arbitration agreement be resolved by interpreting the agreement to incorporate whatever terms are necessary to permit arbitration. Parties who have agreed to arbitrate are presumed to have accepted the legal conditions that attach to arbitration, and courts should read those conditions into the contract so that the underlying agreement to arbitrate is effectuated, not nullified. In this case, where the agreement authorizes the arbitrator to exercise all authority under the relevant law but is otherwise largely silent about the specifics of arbitration, the Eleventh Circuit should have interpreted the arbitration clause in a way that allowed arbitration to go forward.

The Eleventh Circuit should have followed the example of the D.C. Circuit in *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997), where the court upheld an arbitration agreement even though it lacked a term the court found was statutorily required. In *Cole*, the D.C. Circuit held that employees cannot be required, as a condition of employment, to pay arbitrator fees incurred during the resolution of Title VII employment discrimination claims. The arbitration agreement in *Cole* was silent on the question of who would pay the arbitrator's fees. *Id.* at 1485. However, the D.C. Circuit did not therefore find (as the Eleventh Circuit did below) that the arbitration agreement was unenforceable because it "fail[ed] to provide the minimum guarantees required to ensure [plaintiff's] ability to vindicate her statutory rights," Pet. App. at 18a. Instead, the D.C. Circuit carefully considered the FAA's pro-arbitration policy, as well as District of Columbia contract law, and then interpreted the agreement's silence in a manner that preserved the agreement to arbitrate -- by construing the agreement to require the employer to pay all of the arbitrator's fees. Interpreted in that manner, the arbitration agreement was consistent with Title VII and "valid and enforceable." *Cole*, 105 F.3d at 1485-86.

The *Cole* approach should be applied whenever an arbitration agreement is silent or ambiguous. In this case, the Eleventh Circuit was presented with an arbitration agreement that did not state what the arbitration fees would be. Instead of conjuring up a parade of horribles and assuming the worst, the Court of Appeals should have interpreted the contract to provide for a reasonable fee arrangement consistent with the TILA and ECOA. Given such a plain choice between a construction that upholds an arbitration agreement and a construction that negates it, the Eleventh Circuit erred by choosing to invalidate the agreement.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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